2011

Author Meets Reader, Scholar Meets Worker: An Introduction to the Section on Labor Relations and Employment Law 2011 AALS Panel Presentation

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AUTHOR MEETS READER, SCHOLAR MEETS WORKER: AN INTRODUCTION TO THE SECTION ON LABOR RELATIONS AND EMPLOYMENT LAW 2011 AALS PANEL PRESENTATION

BY
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I. INTRODUCTION: THE 2011 LABOR SECTION PROGRAM

When the Executive Committee of the American Association of Law Schools (AALS) Section on Labor Relations and Employment Law (the Labor Section)[1] met in January 2010 to select a topic for our 2011 program, we were inspired by two things: the seventy-fifth anniversary of the National Labor Relations Act (NLRA or Act)[2] of 1935 and the imminent publication of Professor Jack Getman's monograph, *Restoring the Power of Unions: It Takes a Movement*.[3] The NLRA, and the National Labor Relations Board (NLRB or Board) it created, have long been favorite targets of labor law scholars who cite the anachronisms and biases of the Act and the political leanings of the Board as principal contributors to the alarming erosion of union density among the ranks of American workers.[4] Against this background, Getman's book turns the focus inward to the labor movement itself, concentrating on what unions have done and failed to do to mobilize and sustain a healthy labor movement notwithstanding the impressive legal and practical obstacles to successful organizing and contract negotiations. In selecting an "author meets reader" format, the Executive Committee hoped to engage Getman's ideas and the state of the labor movement generally in the context of the existing scholarly debate over the NLRA and the Board.

A third source of inspiration for the 2011 program soon arose. Within days of the Executive Committee's selection of the 2011 Meeting program topic, Local 2 of UNITE HERE[5] called for a consumer boycott of the San

1. The 2010 Executive Committee of the Section included Chair-Elect Ann McGinley (UNLV), Secretary/Treasurer Jeffrey Hirsch (Tennessee), Members at-Large D. Aaron Lacy (SMU), Peggie Smith (Iowa/Washington University) and Juliet Stumpf (Lewis & Clark), and me serving as Chair.

2. 29 U.S.C. §§ 151-63 (2006).

3. JULIUS G. GETMAN, RESTORING THE POWER OF UNIONS: IT TAKES A MOVEMENT (2010).

4. *See, e.g.*, Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 399-400 (1992) (detailing the decline of unionization in the private employment sector since the late 1950s and the erosion of NLRA protections through judicial and legislative action); Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223, 224-31 (2005) (acknowledging the overwhelming view that the NLRA, the NLRB, and unions are irrelevant and "even un-American" before stressing a return to the NLRA's original values); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1532-44 (2002) (noting that American labor unions have suffered under the NLRA because there have been no changes to labor law, Congressionally or jurisprudentially, since the 1950s due to political stalemates between pro-union and pro-employer representatives); Jeffrey M. Hirsch, *Revolution in Pragmatist Clothing: Nationalizing Workplace Law*, 61 ALA. L. REV. 1025, 1072 (2010) (identifying the NLRB's "blatant politicism" as one of the factors "undermin[ing] the NLRB's credibility and its ability to enforce the NLRA's goals"); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 621-30 (2001) (explaining that the NLRA's provisions on bargaining units, arbitration, secondary boycotts, and successorship, as well as its definitions for "employer" and "employee," are unresponsive to today's workplace).

5. HERE (Hotel Employees and Restaurant Employees International Union) and UNITE (Union

Francisco Union Square Hilton, the hotel scheduled to serve as the primary site for the 2011 AALS Annual Meeting.[6] When the national leadership of the AALS proved unresponsive to the union's entreaties, a group of interested law professors, including the leadership of the Labor Section, undertook to convince AALS to relocate the 2011 Meeting in deference to the boycott. Our efforts, which included direct appeals to AALS leadership and grassroots mobilization of faculty attendees, became its own mini-movement, one that like many of the movements described by Getman and his commentators both achieved successes and suffered failures.

In this Introduction, I offer an overview of the substance and the context of the Labor Section's program at the 2011 Annual Meeting. Central to my reflections is the role that the contemporaneous labor dispute at the Hilton Union Square played as a backdrop to our discussions. The events surrounding UNITE HERE's boycott provided a foil for Getman's insights and the contributions of the panelists, one that both frustrated and inspired. The dispute underscored the difficulties of achieving fair results for workers in an era of globalization and during a time of economic hardship. It also sadly reaffirmed the universality of the basic conflict at the heart of labor/management relations – the tension between those with power and voice and those without. Yet, the Hilton dispute also confirmed Getman's optimistic message about the potential for successful labor movements. It demonstrated the power of UNITE HERE's organizational and bargaining strategy – a combination of worker-driven, grassroots action combined with broad, public attacks on corporate interests and vulnerabilities –which has proved critical to its ability to secure contract victories despite the powerful forces aligned against contemporary labor unions.

Part II of this Introduction reviews Getman's monograph. Part III lays out the events surrounding the Hilton boycott and the ensuing struggle between committed faculty and AALS leadership over the site of the Annual Meeting. From these events, I draw several lessons that resonate with Getman's thesis about the potential for strong labor movements and the need for legal reform. Part IV summarizes the symposium contributions and concludes.

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of Needletrades, Industrial, and Textile Employees) merged in 2004. UNITE HERE Historical Timeline, <http://www.unitehere.org/about/history.php> (last visited Dec. 7, 2011); *see generally* GETMAN, *supra* note 3, at 138-49 (describing reasons for the merger and the subsequent challenges of integrating the two unions). Throughout this Introduction, I refer to HERE in discussing pre-merger events and UNITE HERE when describing contemporary events including the Hilton boycott that is the subject of this piece.

6. The boycott was called for on January 5, 2010.

II. WORKER-CENTERED SCHOLARSHIP: GETMAN'S *RESTORING THE POWER OF UNIONS*

Getman's *Restoring the Power of Unions* is a rich work that operates on many levels to present an overarching message about the source and potential for union movements. Getman tells the story of the rise of UNITE HERE, a counterfactual to the now widespread assumption that the contemporary labor movement is dying or defunct. Throughout the book, he demonstrates how tenacious and visionary union leaders Vinnie Sirabella and his protégé, John Wilhelm, succeeded in expanding membership and achieving contract victories through the use of innovative, worker-centered campaigns that operate largely independent of the NLRB and traditional labor law protections.

A. The Strategy

1. A Union of and for Workers

As Getman explains, UNITE HERE's success owes principally to its commitment to worker agency and voice. Crucial to its organizing strategy is the creation of a strong worker-organizing committee, comprised of rank-and-file members, that serves as a launching point for all outreach efforts. The beginnings of this technique are apparent in Getman's rendition of HERE's hard-won campaign to organize Yale's Clerical and Technical workers during the 1980s. Under Wilhelm's leadership, a handful of paid union organizers enlisted, trained, and promoted numerous rank-and-file leaders, forming a worker-driven steering committee that could reach thousands of bargaining unit employees dispersed across a large campus.[7] These workers' experiences were the heart of the campaign. Union organizers encouraged them to speak publically at emotionally-charged union rallies; they brought them to witness (and subsequently speak about) Board proceedings at which Yale opposed the union's election petition; and they incorporated their signatures and personal statements in all of the union's campaign literature.[8]

UNITE HERE has similarly relied on a worker-centered process in approaching collective bargaining. Following its victory among the Yale clerical workers, the union obtained feedback from almost two thousand employees in developing its bargaining proposal.[9] As in the organizing

7. *See* GETMAN, *supra* note 3, at 60-61.
8. *See id.* at 62-64.
9. *See id.* at 66.

process, it deployed workers as spokespersons for the union's public position. Workers, not organizers or union officials, routinely appeared and were quoted in media coverage of the ensuing strike.[10]

This commitment to making workers the initiators as well as the beneficiaries of the union has since become a consistent and integral part of UNITE HERE's organizing and negotiating strategy. In each of the contemporary campaigns Getman recounts, a critical step is the mobilization and training of rank-and-file workers through the union's signature worker committee. This approach has empowered workers, made the union relevant to their needs, and most importantly, instilled the energy and drive necessary to support tough labor contests.

2. The Comprehensive Campaign

While HERE has made workers the voice of the union, it has also recognized the limits workers face in any contest with management. A key insight of the comprehensive campaign strategy is that a withdrawal of services at a single worksite is insufficient to persuade large, diversified companies to settle favorably with a union, particularly in industries where workers can be easily replaced.[11] Thus, the union has sought to expand the contest to multiple fronts within a particular corporation or industry, for instance, by pursuing campaigns against multiple hotels in a particular class or chain or against all hotels within a specific city or area.[12]

At the same time, it has expanded the type of pressure tactics brought to bear in pursuit of workers' interests, reaching beyond traditional weapons like the strike. Drawing on the strategies developed by Jeff Fiedler of the Food and Allied Service Trades, it has developed and refined the comprehensive corporate campaign. The corporate campaign strategy involves extensive research into a corporation's financial structure and business interests in order to identify non-traditional pressure points, often unrelated to the company's labor relations policy.[13] Based on such research, organizers and workers have interfered with corporate efforts to obtain funding or other contracts, reported employer violations of industry regulations, researched and revealed corporate corruption, and threatened to withdraw un-

10. *See id.* at 69.

11. *See id.* at 222 ("It is no longer the case (if it ever was) that strikes can be won at a single facility by withholding labor and persuading customers and truck drivers to honor a picket line. Powerful corporations can almost invariably continue to operate despite the presence of a picket line at one ore even several facilities.").

12. *See, e.g., id.* at 84-85 (describing the culinary campaign effort to organize all of the major Las Vegas hotel/casinos); *id.* at 131 (describing strategy of coordinating contract termination dates nationwide within the hotel industry).

13. *See id.* at 102.

ion pension funds from interested financial institutions.[14]

However, such research need not lead to the exploitation of corporate weaknesses. It can reveal new paths for negotiation or even identify areas of mutual interests. Thus, in the strike against Frontier Hotel in Las Vegas, workers helped elect a shop steward to the state senate who was able to then use her position to pressure the governor to intervene.[15] In the broader Las Vegas culinary campaign, the union was able to offer its political support to the coalition of casinos in connection with a federal tax initiative that was of concern the gaming industry.[16] Through such tactics, UNITE HERE has demonstrated how unions can be powerful business allies as well as formidable foes, prompting employers to choose a partnership model of labor relations.[17]

B. The Role of Law and Legal Reform

What UNITE HERE has not done in formulating its method is refine its legal strategies. Over the years, it has eschewed reliance on labor law protections and Board procedures. The union favors card check organizing and voluntary recognition over the NLRB election process.[18] It has preferred the diversified pressure tactics of the corporate campaign to the isolated use of strikes at particular facilities. Throughout the book, the union leaders Getman quotes express skepticism about traditional processes and techniques, questioning the ability of labor law to level the inherent power imbalance that workers face in dealing with management.[19]

Similarly, *Restoring the Power of Unions* lets law take a back seat to the real-life dynamics of making movements work. Yet the call for legal reform is by no means absent from the book. Getman calls for various changes in the law, from reforming the Board's election process to strengthening the strike weapon.[20] Importantly, however, Getman's purpose in advocating reform is not to deliver any easy wins to unions but to enable the organic development of strong and sustainable labor movements.

For this reason, Getman's suggestions differ in key respects from those of many scholars. Most notably, Getman offers only tepid support for

14. *See id.* at 82 (quoting Fiedler's 1984 paper presentation on the advantages of such tactics over the traditional election process).

15. *See id.* at 87-88.

16. *See id.* at 85.

17. *See id.* at 86-87, 103-04.

18. *See id.* at 109-11.

19. *See, e.g., id.* at 83 (quoting FAST lawyer Richard McCracken stating that he would "never file another NLRB election petition, because [he] was convinced you couldn't organize through the NLRB").

20. *See id.* at 268-74.

the proposed Employee Free Choice Act (EFCA), the much heralded and highly controversial legislation that would endorse card check organizing.[21] He also rejects the idea that employers' response to union election campaigns will necessarily intimidate voters.[22] Getman prefers granting equal access rights to union organizers over bolstering card check procedures or regulating employer speech.[23] His argument is testament to the faith he places in both unions and workers. Good organizers can counteract employer propaganda; but they must have an opportunity to deliver their message.

In the same vein, Getman's proposed reforms to the rules of engagement in economic contests focus on permitting and sustaining broad solidarity among workers as well as across other interest groups. His most mainstream suggestion – overturning management's right to permanently replace strikers – is not merely a thumb on the scale for workers in the moment of conflict, but a means of ensuring solidarity over the course of a collective bargaining relationship. Drawing on the infamous International Paper strike in Jay, Maine, he describes how management's ability to retain strike breakers devastated both the union workers and the larger community. Even after the strike ended, hostility continued as returning strikers were forced to work side by side with the replacements who had permanently assumed the jobs of their striking colleagues.[24]

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21. *See id.* at 261-67. EFCA was last introduced in the 111th Congress. H.R. 1409, 111th Cong. (2009); S. 560, 111th Cong. (2009). For articles discussing its provisions and significance for labor, see generally Henry H. Drummonds, *Beyond the Employee Free Choice Act: Unleashing the States in Labor-Relations Management Policy*, 19 CORNELL J.L. & PUB. POL'Y 83, 98-113, 143 (supporting the passage of the EFCA but calling for more expansive reform to labor relations policy, including experimentation at the state and local level); William B. Gould IV, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States*, 43 U.S.F. L. REV. 291, 311-14, 324-28, 344-45 (2008) (expressing support for EFCA's union recognition and arbitration provisions but suggesting that a supermajority of authentication cards be required to circumvent a secret-ballot vote); Raja Raghunath, *Stacking the Deck: Privileging "Employer Free Choice" over Industrial Democracy in the Card-Check Debate*, 87 NEB. L. REV. 329, 336-38 (2008) (expressing approval for EFCA as means of providing workers a more democratic path to selecting a bargaining representative that avoids the coercion often associated with secret-ballot Board-run elections); Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 656-64, 712-27 (2010) (acknowledging that EFCA provisions "constitute an improvement over the status quo" but offering alternatives to better address managerial intervention in union organization); Paul M. Secunda, The Contemporary "Fist Inside the Velvet Glove": Employer Captive Audience Meetings Under the NLRA, 5 FLA. INT'L U. L. REV. 385, 399-403 (2010) (asserting that free-choice is a "central animating principle" of labor relations statutes and that EFCA carries forward the sentiments originating in the Wagner and Taft-Hartley Acts). *But see* RICHARD A. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT (2009) (suggesting that EFCA eliminates employees' free choice by allowing unions to coerce employees); Harry G. Hutchinson, *Employee "Free" Choice in the Mirror of Liberty, Fairness, and Social Welfare*, 60 CATH. U. L. REV. 575, 575-613 (2011) (same).

22. *See* GETMAN, *supra* note 3, at 204-11.

23. *See id.* at 211.

24. *See id.* at 226-27.

But if unions are unlikely to succeed using traditional strikes alone, than it is not enough to change the rules regarding replacement workers. Rather, the law must evolve to protect all aspects of the comprehensive campaign. As Getman points out, many of the techniques deployed by unions are of questionable legal status. Workers engaged in job actions that fall short of a full work stoppage need fear that their conduct will be deemed an unprotected partial strike.[25] Unions seeking to build solidarity with consumers and other allies have to navigate complex rules that prohibit so-called secondary boycotts, subject to special exceptions.[26] If unions are to stand a fair chance against national and multi-national companies, the law must protect their ability to engage in creative protests and reach across lines that have traditionally separated companies, their suppliers, and end users.

In sum, while UNITE HERE has not relied heavily on law, the ability to sustain and replicate its approach may well depend on legal reform. Rules based on an antiquated model of economic warfare must give way in recognition of the new dynamics in which both unions and companies operate.

III. LIFE IMITATES LAW: THE HILTON BOYCOTT

Noteworthy in *Restoring the Power of Unions* is the book's narrative approach, which echoes Getman's message about worker-centered unionism. According to Getman, UNITE HERE has succeeded by consistently making workers the spokespeople of the union and looking to the rank-and-file as a source of future leaders and organizers. Not coincidentally, Getman's book follows this tradition, using the voices of the workers and organizers who played a role in critical campaigns to tell the story of UNITE HERE's rebirth. Getman tells us that a union succeeds by putting the voices of its constituents first; his book succeeds for the same reason.

In that tradition, I too turn to narrative. In the section that follows, I offer a story about how a group of activist law professors mobilized in an attempt to convince the AALS to honor UNITE HERE's consumer boycott of the Hilton Union Square in San Francisco. It is a story I tell modestly, focusing as it does on one narrow sliver of the union's long-standing campaign against the Hilton and other San Francisco hotels. It is also an aberrational story, one involving the organization of highly privileged law faculty rather than the service sector workers UNITE HERE represents. Even so, it is a story that analogizes to the types Getman tells about the successes

25. *See id.* at 226-27.
26. *See id.* at 232-35.

and failures of various organizing efforts and the power of labor movements to change the lives of workers. At the same time, it throws into relief the far more enduring challenges faced by rank-and-file workers in building the type of movement that Getman describes.

A. Law Professors in Support of the Hilton Workers: The AALS Campaign

The San Francisco hotel industry is no stranger to labor unrest, and neither is the AALS. Conferences predating the 2011 Meeting were marred by conflict prompting protest by law school faculty and, in some instances, responsive action by the AALS. In fall 2004, a strike and subsequent lockout at the Hilton and several other hotels prompted the AALS to develop a plan to relocate some of the 2005 Annual Meeting to another venue in the event the standoff continued.[27] In 2006, the AALS, having seemingly learned from the events of 2004-05, made the decision to relocate the 2007 meeting from San Francisco to Washington D.C. in the face of continued labor strife, concluding that there was "a reasonable possibility that the current boycott could result in a strike during the time of the AALS Annual Meeting."[28]

Even so, the AALS leadership proved unprepared, or perhaps unwilling, to deal with the events that unfolded in the lead up to the January 2011 Annual Meeting. That dispute ultimately culminated in an organized faculty-led effort, first to persuade the AALS to relocate the Annual Meeting, then to encourage individual faculty sections to move their programs out of the Hilton and refuse to participate in events taking place there. While the former effort was not successful, the latter was. The AALS was at times non-responsive to appeals of the faculty boycott supporters; at times it was outwardly resistant. In contrast, the support of individual faculty members was overwhelming. As a result of the grassroots efforts of the faculty boycott supporters, over ninety percent of the Annual Meeting sessions requested relocation out of the Hilton in support of the boycott, and several speakers whose sessions were not relocated by the AALS cancelled their appearances.

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27. This so-called "Plan B," however, was never launched, The parties agreed to a city-wide "cooling off period" at the urging of San Francisco's mayor, which ended the strike and lockout. In light of this, the AALS unilaterally decided to restore relocated events to the Hilton. However, the cooling off period did not settle the underlying dispute or end the union's calls for a consumer boycott of the targeted hotels. When the AALS proved unwilling to go forward with the relocation plan in support of the boycott, –the Labor Section chose to independently relocate its program to the University of San Francisco Law School.

28. Memorandum from Carl Monk, Executive Director, AALS to Deans, Faculty and Staff of Member and Fee Paid Schools (May 3, 2006), *available at* <http://www.aals.org/deansmemos/06-12.html>.

1. The Underlying Dispute

The dispute between Local 2 and the Hilton was in many ways typical of contemporary labor contests. The union's previous collective bargaining agreement expired in August 2009 and subsequent negotiations were unsuccessful. Blackstone Group, the private equity firm that owns the hotel, appeared to be thriving financially notwithstanding the economic recession.[29] Yet it pursued a strategy of demanding deep concessions from its workforce. Particularly upsetting to workers was a proposed increase in employee health care contributions that the union estimated would cost workers an additional $200 per month and a change in housekeepers' workload from fourteen to twenty rooms per day, a forty percent increase in work volume.[30] In addition to opposing these demands, the union sought modest increases in wages and pension contributions. Like most contemporary contract renegotiations, however, the union's position was largely one of defending current standards rather than seeking significantly improved terms of employment. From the perspective of the workers, the fight was about the ability to earn a decent living and support their families by working an honest and safe job.[31]

The approach of the union was illustrative of the comprehensive campaign strategy documented by Getman and reflective of the realities of the current economy. The Hilton dispute was not an isolated contest, but the union's first target in a major effort to renegotiate contracts with compara-

29. For news articles reporting on Blackstone's growth strategy and financial health during the relevant period, see generally Rick Carew, *International Finance – Blackstone Opens in Shanghai*, WALL ST. J., Nov. 2, 2009, at B6 (reporting on Blackstone's expansion into China's private-equity market); Kris Hudson, *Corporate News: Blackstone to Join General Growth Investors*, WALL ST. J., May 22, 2010, at B5 (describing how Blackstone contributed $500 million to a $6.5 billion proposal to buy General Growth Properties Inc., the second-largest U.S. mall owner, when the company exited bankruptcy); Matthew Karnitschnig, *Blackstone's Hedge; Buyout Firm Fights a Slump*, WALL ST. J., Jan. 11, 2008, at C3 (reporting that Blackstone, in response to the credit crisis, expanded into areas resistant to such downturns); Lingling Wei, *Global Finance: Blackstone Reworks $7 Billion in Debt – Deal Is Struck to Restructure Cash Owed on Purchase of Sam Zell's Equity Office Properties Trust*, WALL ST. J., Dec. 17, 2010, at C3 (describing how Blackstone restructured debt from property buy-out deals, including Hilton Hotels, to prevent money-loss despite the hurting real-estate market); Gregory Zuckerman, *Global Finance: Blackstone Raises Fund of $15 Billion*, WALL ST. J., Dec. 21, 2010, at C3 (reporting that Blackstone had finalized "the largest fund for buyout deals since the financial crisis erupted and one of the largest on record").

30. *See* Carl Finamore, *The Good, The Bad, and The Ugly in SF Hotel Dispute*, BEYONDCHRON (Jan. 10, 2011), <http://beyondchron.org/news/index.php?itemid=8796;>; UNITE HERE Local 2, Boycott the Hilton Hotel Union Square (undated) (on file with author).

31. As AFL-CIO president Richard Trumka described the dispute at the January 5, 2010 rally that kicked off the boycott, "'It's about the struggle of all working women and men in our country . . . to hold onto our rightful share of the American dream.'" Marilyn Bechtel, *Hotel Workers Sit in, Proclaim San Francisco Hilton Boycott*, PEOPLE'S WORLD (Jan. 7, 2010), <http://www.peoplesworld.org/hotel-workers-sit-in-proclaim-san-francisco-hilton-boycott/>; *see also Workers at San Francisco's Largest Hotel Begin 6-Day Strike*, OAKLAND TRIB., Oct. 13, 2010 ("The union alleges that proposals by hotel management would 'lock workers into permanent recessionary contracts.'").

ble hotels city-wide.[32] In pursuing the Hilton, the union chose to conduct a consumer-oriented campaign that aimed to interfere with customer use rather than the hotel's ability to provide services. Rather than calling for an all out strike, it conducted intermittent protests, picketing, and job actions that enhanced the public visibility of the workers' position.[33] These actions culminated in a full-scale consumer boycott approved by a worker vote. In January 2010, workers and their supporters staged an 800-person march through downtown San Francisco to announce the boycott, ending in a sit-in in the Hilton Union Square entry plaza.[34]

The focus of the campaign was obtaining the support of individual and corporate customers. Through letters and delegations the union sought to inform potential hotel users of the labor dispute and to secure a commitment to honor the union boycott. These were successful in many instances. The day the boycott was announced, the Instituto Laboral de la Raza, an advocacy group supporting low-wage workers, announced that it would move its annual awards banquet to another event venue, removing approximately $100,000 in business.[35] Such showings of solidarity were not limited to natural allies like Laboral. In October, the American Political Science Association, an organization of academics and political science professionals publically withdrew its 2011 Annual Meeting from the Hilton, relocating the event to Seattle.[36] The Southwest Center for Human Relations Study similarly relocated its 2011 Conference on Race and Ethnicity, a 2000-person event, opting for another San Francisco hotel.[37] Over the course of the campaign, the union secured pledges from numerous neutral organizations and individuals to endorse, not only its boycott of the Hilton

32. The dispute involved sixty-one other San Francisco hotels employing 9000 hotel workers, with each hotel negotiating with the union individually. The San Francisco campaign was also coordinated with hotel contract negotiations occurring in other major cities. *See* Tom Abate, *3-Day Strike Ends at Hyatt Regency*, S.F. CHRON., June 12, 2010, at D1 (describing union's multi-hotel and multi-city strategy).

33. *See Workers at San Francisco's Largest Hotel Begin 6-Day Strike*, *supra* note 31 (6-day Hilton strike in October 2010); Bechtel, *supra* note 31 (boycott announcement and sit-in at Hilton entrance); Sarah Duxbury, *Hilton Workers to Strike Next Week*, S.F. BUS. TIMES (last modified Oct. 16, 2010, 12:16 AM PDT), <http://www.bizjournals.com/sanfrancisco/blog/2010/09/hotel_union_plans_hilton_strike_for_next_week.html > (public boycotts, strike vote and "aggressive letter-writing campaign" directed at San Francisco hotels during 2010).

34. Bechtel, *supra* note 31.

35. *See* Carl Finamore, *The San Francisco Hotel Dispute*, COUNTERPUNCH (Jan. 6, 2011), <http://www.counterpunch.org/2010/01/06/the-san-francisco-hotel-dispute/>; Instituto Laboral de la Raza 2010 Labor Awards "Save the Date Card," *available at* <http://www.ilaboral.org/2010Awards/images/2010images/ILR-2010-AWARDS-SaveTheDateCard-2sides.pdf> (announcing change in location "[i]n solidarity with UNITE HERE Local 2 hotel workers").

36. *See* Letter from Carole Pateman, President, Am. Pol. Science Ass'n, 2011 APSA Annual Meeting Location Change (Nov. 23, 2010), *available at* <http://www.apsanet.org/content_73505.cfm>.

37. *See* Press Release, Nat'l Conference on Race and Ethnicity, Hotels for the National Conference on Race and Ethnicity (ENCORE®) Announced (Feb. 16, 2011) (on file with author).

but any boycott conducted in furtherance of the workers' city-wide campaign.[38]

2. The AALS Decision and Faculty Request for Reconsideration

The AALS was not among these supporters. During the late summer and early fall, members of Local 2, supported by individual law professors and other interested organizations engaged in a letter writing campaign in an attempt to convince the AALS to honor the boycott. In early August, the union sent an e-mail request to the AALS, asking for its support and offering assistance in relocating the Meeting.[39] This was followed by a letter from the Society for American Law Teachers (SALT), emphasizing the importance of the AALS's decision in providing leverage to the workers and requesting the AALS to communicate with attendees about the ongoing dispute and the risk of disruption by worker concerted activity.[40]

The AALS did not respond directly to these appeals. Rather, on September 27, the AALS announced its decision not to relocate or cancel the 2011 Meeting.[41] Presenting its conclusion as "the best among . . . bad choices," the AALS cited respect for its contractual commitment with the Hilton as well as the logistical impediments to relocation. The AALS did not meet or speak with any of the constituencies who had proposed relocation in advance of its decision. It did, however, state that it would allow a subset of AALS sections to request relocation of their individual programs to another hotel through a soon-to-be-articulated process.[42]

To a number of law professors, this conclusion and the support cited were unconvincing. In October, a group of deans and other legal academics, spearheaded by Professors Karl Klare, Gary Peller, and Mike Seidman, called on the AALS to reconsider its decision.[43] This "Joint Request for

38. *See* Contract Fight Boycott Endorsers (undated) (on file with author). A list of past and current boycott endorsers is available at Local 2's website. *See* Our Supporters, ONE DAY LONGER SF, <http://www.onedaylongersf.org/?cat=9> (last viewed Dec. 9, 2011).

39. *See* E-mail from Riddhi Mehta-Neugebauer, Local 2, to H. Reese Hansen, President, AALS (Aug. 2, 2010, 12:03 PM) (on file with author).

40. *See* Letter from Raquel Aldana & Steven Bender, SALT Co-Presidents, to Susan Westerberg Prager, Executive Director and CEO, AALS (Sept. 1, 2010), *available at* <http://www.saltlaw.org/userfiles/file/9-1-10Pragerboycott.pdf>.

41. *See* Letter from H. Reese Hansen, President, AALS et al., to Faculty and Staff, Important Message Concerning the 2011AALS Annual Meeting (September 27, 2010) [hereinafter September 27 Letter], *available at* <http://www.aals.org/am2011/AM&SFLaborDisputeMemo.pdf>.

42. *Id.* at 3. The letter stated that programs would be moved to the Hotel Nikko, one of the three conference hotels. The Nikko was not at the time subject to a labor dispute; however it was and continues to be non-unionized. Thus, as the AALS acknowledged, for many faculty committed to supporting the union, this was not an acceptable relocation site.

43. Letter from Mark Tushnet, Professor of Law, Harvard Law School et al., to AALS Executive Committee (undated) [hereinafter the Joint Request], *available at* <https://6119995265659744581-a-1802744773732722657-s-sites.googlegroups.com/site/lawprofsforhiltonworkers/home/documents/Law

Reconsideration" questioned both the substance of the AALS's conclusion and the anti-democratic nature of the organization's decision-making process, calling on the AALS to delay final decision about relocation and engage in a debate with member schools and their faculty.[44] Shortly after, a group of individual faculty members sent a second letter to AALS, appealing to both principle and pragmatics.[45] Citing the special role of law faculty, this "Open Letter" urged the AALS not only to honor the personal convictions of individual faculty members but to appreciate the symbolic significance of legal educators acting in concert with workers:

> In our view it is part of a law professor's job … to model for students a commitment to principle even when that is inconvenient or inexpedient. Many of us will understand that responsibility to include honoring the workers' boycott in this situation.
>
> [W]e also aspire that our professional association be one embodying respect for the legitimate and legal organizing efforts of disempowered people. [I]t is important to many law teachers that their professional association not effectively side with the Blackstone Group by rendering nugatory one of these workers' few economic weapons – the willingness of customers to stop doing business there until the labor conflict is resolved.[46]

The Open Letter went on to point out the costs of remaining at the Hilton[47] and questioned the AALS's assertion that its relocation options were limited.[48] The letter also took issue with the AALS's invocation of its contractual commitments, contesting the premise that contractual obligation

%20Professor%20Joint%20Consideration%20Request%20to%20AALS%20Oct%2012%202010.pdf?attachauth=ANoY7coXs_HZ1h4_Nl5hCIKpuEWEsuajotFzU6FNWDksSE_kVTfer4g11ZtUyqfCD5Y1rxt_gZXj7OwSMbCcS7MHrhhn9MhUQtyj00f_joLFrlCC9oMQQ_ufNZopbqbNyC_NULPefRJmwhmIcdeX66jbE5JEO9k1Qj8EbA9XQWanoHokvLWYoo2-LD-eSd4XSW66JXGjVTdw5r2XCXrOKPauVE10IbZiiqRIANjEJNUYAvJPcyYyU7bKX7aHTdDhGCe4VxAmVahtbAwAr6SDTS0UpUgdeS5Y8vbBd1UUnRsRkCOJp9lPZ1fY8mNGn6lXEuSVl9yRM5Ph&attredirects=0>.

44. *Id*.

45. *See* Letter from Katherine Stone, Professor of Law, UCLA Law School et al., Open Letter in Support of Request for Reconsideration of the AALS' Decision to Convene Annual Meeting at the Hilton Hotel in San Francisco (undated) [hereinafter Open Letter], *available at* <https://6119995265659744581-a-1802744773732722657-s-sites.googlegroups.com/site/lawprofsforhiltonworkers/home/documents/Law%20Professor%20Open%20Letter%20to%20AALS%20Executive%20Committee % 20Seeking%20Reconsideration%20of%20the%20Hilton%20Decision.pdf?attachauth=ANoY7cpjN5Y1VZUbB2xT7iZJUkuFrYAT1iEv15vo1wtNrqEXC3EafgtOXbiVUyOxr7L50pH4R-pTbYen1taf8JzqMkW7zc6NssVJCaXY2IUzfMVgh-vs0X7AWG7Jr20F3LxvvvX0pW3RYMQl0lLHZ81ovaPj1sjvEyKrR54f-B-mGcldVSRYbJofaYFIihW7yEQhFAsyXvxj0WraZI5bC03RF5k2fQymY67WZ6Yseett_R-22Q8OUKe9XMbY8SMBlRZChnttmfkESh_jvswv3eM95MaCinTdE6Ih7xsJIucLx1NhRRi8kjiKT_TDE8ySDSy6tS5j0wzHkOiDyMpYIRyABK-n3XwbCMUkfxpSj4JkLkncTYQbE%3D&attredirects=0>. Some of the same faculty signed both the Joint Request and the Open Letter.

46. *Id.* at 2.

47. *Id.* at 3-4 (suggesting that the AALS had given insufficient consideration to the potential for a downturn in attendance, distraction from the business of the meeting, and disruptions by protests and other job actions).

48. *Id*. at 4, app. 5 (providing a list of possible alternative venues).

should be placed above other ideological commitments and questioning whether the AALS would in fact incur liability in moving the Meeting.[49]

On October 19 the AALS issued an "update" on its efforts to deal with the ongoing labor dispute.[50] It did not address the arguments raised by the Joint Request and Open Letter with respect to its decision not to relocate, but described additional measures it had determined to take in order to accommodate those with "strong personal feelings" about the dispute.[51] These included agreeing to make available a third hotel, Wyndham Parc 55, capable of accommodating more programs.[52] The AALS did not respond to the suggestion in the Joint Request that it convene a dialogue with interested faculty, although it offered "thank[s to those who had] written to the AALS to express [their] views."[53]

3. The Alternate Location Process and Grassroots Faculty Action

Following transmission of the Open Letter seeking full-scale relocation, efforts to support the boycott shifted away from the AALS's decision to remain at the Hilton and toward the AALS's announced process for relocating individual section programs. At this juncture, two groups of faculty committed to honoring the boycott came together to work in a strategic fashion, supported by and in concert with the Local 2 workers and organizers.

During September 2010, when Karl Klare, Gary Peller, and Mike Seidman were orchestrating the appeal to the AALS to relocate the Annual Meeting as a whole, I was working with the Executive Committee of the

49. *Id.* at 4-6. The Open Letter observed that an assessment of possible contractual liability depended on the precise language of the contract, including the existence of any liquidated damages or force majeure clauses. The letter noted the absence of any reference to such provisions in the AALS's defense of its relocation decision. Indeed, the AALS's silence about the precise terms of its contract ultimately proved telling. Several months later at the Annual House of Representatives Meeting, the 2011AALS President intimated that the AALS had in fact included in its contract with the Hilton a clause permitting cancellation in the case of unforeseen events. *See infra* notes 92, 4 and accompanying text.

50. E-mail from H. Reese Hansen, President, AALS et al., to Law School Faculty and Professional Staff, An Update Concerning the 2011AALS Annual Meeting & the Hotel Labor Dispute (Oct. 19, 2010, 5:43 PM) [hereinafter October 19 Update] (on file with author).

51. September 27 Letter, *supra* note 41, at 2.

52. The letter explained that the AALS was adding the Parc 55 as an alternate site, having recently received assurances that there would be no active labor dispute at this hotel during the time period of the 2011 Annual Meeting *Id.* Throughout the Hilton Boycott, the Parc 55 was on Local 2's "risk of dispute" list because its workers, like those at the Hilton, were without a contract. However, the Parc 55 was not subject to a boycott or the site of any job actions during the time period relevant to the AALS Annual Meeting. Had AALS responded to the workers and union representatives that sought to contact them about the boycott, it would have learned this earlier.

53. October 19 Update, *supra* note 50, at 2.

Labor Section and the leaders of the other employment law sections[54] to independently relocate our individual panel programs.[55] This appeared to be our safest option, as the AALS had not yet articulated its position regarding the boycott and resolution of the underlying dispute appeared unlikely.[56]

In early October, however, the AALS sent an e-mail to all section leaders communicating its decision not to move the Annual Meeting from the Hilton and detailing the section relocation process it announced in its September 27 letter to the wider community.[57] As a result, the leaders of the employment law sections made the decision, albeit with some reservations, to engage the AALS's designated process as a first choice rather than seek a separate host location for our events. Among those reservations was a concern that acquiescing in the AALS process would effectively sanction the organization's underlying decision not to relocate the larger conference and force us to both associate with and underwrite the proceedings remaining at the Hilton.[58] In wrestling with these issues, the section leaders determined that rather than simply put in our own requests for relocation, we would take the further step of affirmatively encouraging other sections to avail themselves of that option as well. The goal was to get as many sections to request an accommodation as possible to signal to the AALS the strength and breadth of faculty commitment to supporting the boycott.

On October 15, I sent an e-mail to all section chairs and chairs-elect advising them of the labor dispute and the AALS's relocation process.[59] I

54. These included Tristin Green (San Francisco), Chair, Section on Employment Discrimination, and Paul Secunda (Marquette), Chair, Section on Employee Benefits.

55. This was the approach taken by the Labor Section in 2005 under the leadership of Professor Christopher Cameron, then Labor Section Chair, who moved the section program to the University of San Francisco Law School with the support of law school Dean Jeffrey Brand. Thanks are owed to Dean Brand who once again offered support for our relocation, giving his unequivocal assurance that the law school would accommodate us if necessary notwithstanding the significant uncertainty about our needs.

56. During this time I was in contact with and assisted by David Harlan, a Local 2 member, and Riddhi Mehta-Neugebauer, an organizer, who kept us informed about developments in the labor dispute and the status of other "at risk" hotels so that we could provide our section members with up-to-date information about where to safely book accommodations.

57. *See* E-mail from Susan Westerberg Prager, Executive Director and CEO, AALS & Jane La Barbara, Managing Director, AALS, to Section Chairs and Chairs-Elect (Oct. 8, 2010, 8:06 PM) [hereinafter the October 8 E-mail] (on file with author).

58. The AALS had indicated that it would not be able to grant all requests for relocation. *See* September 27 Letter, *supra* note 41, at 2-3 (acknowledging that the relocation process would "not [be] a comprehensive solution and warning that it "might not be able accommodate all requests"). In addition, the AALS relocation information did not explain the implications of that process on registrants' conference fees. Some faculty were concerned that by registering and paying for the conference, we would be supporting the Hilton financially. I raised this issue with the AALS and was told that there would be no adjustment to the conference fee for registrants who intended to attend only the subset of programs relocated out of the Hilton.

59. *See* E-mail from author to AALS Section Chairs (Oct. 15, 2010, 4:45 PM) (on file with author). This distribution required some legwork. The AALS does not provide e-mail or other address lists

attached a copy of the Open Letter and copied Professors Klare, Peller, and Seidman, whom I knew to be the principal drafters of that letter.[60] From that point forward, we worked closely to coordinate the efforts of their team with those of the employment law section leaders in order to strengthen our appeal to section leaders and individual faculty. Our strategy was to bridge the gaps in the AALS relocation process, which had been opened only to section leaders. Speakers and organizers of non-section events did not receive the October 8 letter, nor were they provided any alternative avenue for requesting relocation. In addition, the AALS imposed several hurdles on section leaders seeking relocation. Sections were required to "explain the rationale for the[ir] request" and demonstrate that "all" section officers and executive committee members had engaged in "careful consideration of the impacts on the planned program and agree that the change should be made."[61] In other words, the decision to relocate had to be not only deliberative, but also unanimous.

Given these constraints, our strategy was twofold: encourage and facilitate section leaders' use of the designated relocation process and urge speakers and participants to pressure program organizers to seek relocation. I followed up my e-mail to section leaders with a set of detailed instructions for complying with the AALS requirements, which included a sample "narrative" explaining the rationale for the request.[62] Professors Klare, Peller, and Seidman sent personal e-mails directly to individual section leaders urging them to seek relocation and to individual speakers, particularly those scheduled to participate in non-section events, urging them to contact program organizers and the AALS notwithstanding their exclusion from the formal relocation process. The union members and organizers remained involved, sending tailored e-mails to these targets about the substance of the underlying dispute and the importance of seeking relocation.

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for faculty or law school use except for section lists that must be purchased. The e-mail sent by AALS to section leaders was addressed so as not to reveal the list of recipients or permit a "reply all" response. I am grateful to the University of Denver College of Law support staff who compiled the e-mail addresses of all section chairs and chairs-elect by cross-referencing lists of each section's executive committee posted on the AALS website with the individual websites of various law schools.

60. Prior to that, I had had no contact with Professors Klare, Peller, or Seidman. The Open Letter was initially distributed only to the addressees and those whose signatures were solicited. I became aware of the Klare-Peller-Seidman effort when the Open Letter was posted by Professor Martin Malin to two labor and employment law faculty listservs.

61. *See* October 8 E-mail, *supra* note 57, at 3.

62. E-mail from author to Section Leaders (Oct. 21, 2010, 4:17 PM) (on file with author). My e-mail also attached a "revised" relocation form which I prepared (using the form provided by AALS) to reflect the addition of Parc 55 as a possible alternative location. Although the AALS stated in an e-mail that it would consider moving programs to the Parc 55, its form for requesting relocation, prepared and distributed subsequent to that announcement, listed only the Hotel Nikko and area law schools as the possible choices for relocation.

The result of this joint-effort was a groundswell of support. Our best estimate is that of ninety-one sections, approximately seventy-eight submitted requests for relocation for seventy out of eighty-two programs.[63] Among those sections that did not submit requests, there were in some cases individual leaders or speakers sympathetic to the boycott, but who lacked sufficient support from the section's executive committee to satisfy the AALS's unanimity requirement.[64] Approximately two-thirds of the section requests were granted.[65] At least one non-section program relocated independently to a public space rather than meet in the Hilton.[66] In addition, some speakers scheduled to participate in non-section sponsored events cancelled their appearances rather than participate in a program that remained at the Hilton.[67]

4. The House of Representatives Resolution and Street Rally

By all accounts the relocation effort was a success. Yet many remained frustrated not only by the AALS's initial decision not to relocate the conference as a whole, but the way in which it handled the subsequent section relocation request process. AALS did not inform individual sections whether their requests had been granted until mid-December, three weeks before the conference.[68] In the interim, it issued a letter condemning

63. These figures were determined by cross-referencing the Annual Meeting schedule as it then appeared on the AALS website with the information received by me and/or Gary Peller from Section leaders as to whether they had or had not requested relocation

64. This appears to have occurred with the Section on Admiralty and Maritime Law, *see* E-mail from Joan Vogel, Professor, Vermont Law School to Gary Peller, Professor, Georgetown Law Ctr. (November 8, 2010, 12:16 AM) (on file with author), and the Section on Property Law, *see* E-mail from Kali Murray, Assistant Professor of Law, Marquette University Law School to Gary Peller, Professor, Georgetown Law Ctr. (October 31, 2010, 10:45AM) (on file with author).

65. This figure was determined by cross-referencing the location information posted in the final program with the requests for relocation of which we were aware. We do not know the reason some requests were denied. It is possible that the number of requests exceeded the capacity of the meeting space reserved by the AALS at alternate hotels, but it is uncertain how AALS determined which events to prioritize. Likewise we do not know if any requests were denied outright for reasons other than space constraints.

66. The "hot topic" program, "The BP Blowout Oil Spill and Its Consequences" moved from its assigned Hilton location to a nearby church.

67. *See, e.g.*, E-mail from Kenneth Dau-Schmidt, Professor, Indiana University Bloomington College of Law to Indiana University Bloomington College of Law Faculty (Jan. 7, 2011, 10:37 AM) (on file with author); E-mail from Hiroshi Motomura, Susan Westerberg Prager Professor of Law, UCLA, to AALS Executive Committee (Oct. 14, 2010, 10:55 PM) (on file with author).

68. The AALS promised "updated program information" by December 16, 2010, seven weeks after the deadline for submitting relocation requests. *See* Letter from H. Reese Hansen, President, AALS et al., to Law School Deans (Dec. 13, 2010) [hereinafter December 13 Letter] (on file with author). This left faculty members in a difficult position in determining whether to plan to attend the conference. The AALS's response to this situation was to offer a refund of conference registration fees to those canceling by December 1. However, as of December 1, it still had not provided any relocation information. Through a direct inquiry to the AALS, I was able to determine that the AALS had decided to grant cancelations through December 17. *See* E-mail from Jane La Barbera, Managing Director,

what it described as "inappropriate" tactics used by an unnamed "member of our community" to instill support for relocation.[69]

While awaiting the results of the relocation process, Professors Klare, Peller, Seidman, and I turned our attention to ways in which we could make our voices heard at the meeting itself. We decided upon two different courses of action: pursuing adoption of a formal statement that the AALS should not site conferences at boycotted hotels and staging a street rally in support of the union and in protest of the AALS's decision to remain at the Hilton.

Professors Klare, Peller, and Seidman took on the task of preparing a resolution on the issue of labor disputes at conference venues for submission to the AALS House of Delegates, the governing body of the AALS comprised of representatives of each member law school. The goal was to elicit an official acknowledgement of the strong faculty sentiment, made evident by the overwhelming response to the relocation process, in favor of avoiding hotels subject to labor disputes. Given the history of labor unrest within the San Francisco hotel industry and the AALS's handling of the 2011 Meeting, the situation seemed destined to reoccur absent further intervention.

The final resolution, jointly introduced by Gary Peller, as the Representative from the Georgetown Law Center, and me, in my capacity as Chair of the Labor Section, set forth "the sense of the AALS community" that the organization should avoid venues subject to labor disputes and negotiate protective language in its contracts to permit cancellation in the event that a labor dispute were to arise at a conference hotel.[70] Despite its

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AALS, to author (Dec. 04, 2010, 7:23 PM) (on file with author). This appears to have been an internal decision that was never publically announced. In addition, the extension for conference fee reimbursement did not address the problem of flights and hotel reservations made in anticipation of attendance. Thus, many faculty spent the weeks between October 29 and mid-December uncertain whether to make travel plans and ultimately having to make last minute and costly bookings.

69. *See* December 13 Letter, *supra* note 68. Although the "member" was unnamed, the statement was clearly a reference to the outreach efforts of Professor Gary Peller, who did the bulk of the work of contacting individual section leaders and panelists. The letter went on to state that some of the faculty members contacted by this individual had felt "badgered" and "harassed" and suggested the individual had misrepresented himself as speaking on behalf of the AALS. We do not know the source of these complaints, if indeed they were made. Certainly at no time did Professor Peller or any member of our team purport to represent AALS. Indeed, the entire basis for our efforts was to express our opposition to the AALS's position.

It also bears noting, that one person's persuasion is another's harassment, particularly where the message content is unwelcome. The blurriness of the distinction has been recognized in labor law jurisprudence, as has the reality that union organizing cannot occur without some element of pressure. *See* Cynthia Estlund, *Freeing Employee Choice: The Case for Secrecy in Union Organizing and Voting*, 123 HARV. L. REV. F 10, 17 (2010) ("The line between coercion and cajoling is blurred ... but is crucial. The former is unlawful under section 8 of the NLRA, while energetic and persistent solicitation of union support among coworkers is not only lawful but protected by section 7").

70. *See* Proposed Resolution of the Labor Relations and Employment Law Section (Nov. 17,

non-binding nature, the resolution was vigorously opposed by the AALS. In a strongly worded memo to the House of Representatives, AALS leadership asserted that it serves as a fiduciary to the organization entrusted to determine the location of meetings, including making case-by-case determinations about how to deal with labor disputes.[71] The memo warned that adoption of such "overly broad" language would eliminate necessary flexibility and force it to make potentially costly changes that would adversely affect faculty and member schools.[72]

The AALS leadership sounded similar themes at the House of Delegates Meeting. Debate was sharply time constrained and limited to brief, relatively formal statements. In our allotted time to speak and our circulated statements, we emphasized that the resolution was non-binding and therefore consistent with the retention of discretion and flexibility desired by the Executive Committee.[73] We pointed out that an articulated "sense of the faculty" represented the mildest type of resolution we could seek from the representatives and that the type of protective language we suggested adopting was standard fare in long-term contracts.[74]

Because views were so divided on the issue, we requested a roll call vote on the resolution rather than a default voice vote. This ultimately proved to be a tactical error. During his remarks, President-Elect Michael Olivas made a plea for those that were uncertain to abstain. Not surprisingly given the tenor of the debate, particularly the Executive Committee's emphasis on its authority, many representatives seemed to welcome that option. In the final count, the resolution was defeated, sixty-one to twenty-four among those registering a vote.[75] Forty-six representatives chose to abstain, a number that, if registered as "yes" votes, would have secured the

2010) (on file with author). As initially prepared, the resolution would have committed the AALS to avoiding hotels or other conference venues subject to an active labor dispute. However, we ultimately jettisoned that version in favor of a non-binding expression of faculty sentiment which we believed would be less controversial and consequently easier to pass.

71. Memorandum from H. Reese Hansen, President, AALS et al., to Members of the 2011 House of Representatives (Dec. 30, 2010) [hereinafter December 30 Statement] (on file with author).

72. *Id*. at 1. The statement suggested that a decision to relocate could impair the organization's ability to secure favorable contracts for future meetings and that a relocation could astronomically increase law school organizational dues. Id. at 2.

73. Transcript of the Association of American Law Schools, House of Representatives, First Session, San Francisco, CA at 25-26 (Thursday, Jan. 6, 2011) [hereinafter House of Representatives Transcript] (on file with author).

74. *See id.* at 26. Indeed, President Olivas remarked during the proceedings that the AALS already negotiates for such clauses in its contracts. *Id.* at 36. In light of this admission, it is difficult to understand not only why the AALS opposed the resolution but also why it refused to consider relocating the conference at the outset and why it emphasized its contractual commitments in explaining that decision.

75. Karen Sloan, *AALS Defeats Bid to Boycott Hotels Engaged in Labor Disputes*, NATIONAL L.J. (Jan. 7, 2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202477415640&slreturn=1>.

resolution's passage.

Whatever disappointment was occasioned by the vote at the House of Representatives meeting only confirmed the sentiment among some boycott supporters that the best way to support the workers in their contest with the Hilton was to make a public stand. Prior to the Meeting, Professors Klare, Peller, and Seidman, along with other faculty coordinated with Local 2 to plan a street rally in the front of the Hilton. The day after our defeat in the House of Representatives, dozens of law faculty and staff joined Local 2 workers in a demonstration during the AALS Presidential Program, the cornerstone event of the Annual Meeting and one of the non-section events that the AALS had declined to relocate.[76] The rally marked the anniversary of the Hilton boycott, called the preceding January. Media was in attendance. Several professors, including Jack Getman and myself, joined Local 2 members in addressing the crowd from the back of a pick up truck.[77]

The campaign against the AALS ended on a high note, and happily so did the overall dispute. Just a few months after the Annual Meeting, Local 2 achieved a favorable contract with hotel management. Under the new agreement, in effect through August 2013, workers receive a pay increase retroactive to the expiration of their prior contract and additional increases over the life of the contract totaling approximately two dollars per hour.[78] Health care coverage remains in effect at previous levels and continues to be fully paid by the Hilton, albeit with a ten dollar co-payment for dependants.[79] Housekeepers avoided any increase in room quotas and obtained a workload reduction for those assigned ten or more checkouts in a day.[80]

Thus, after two years without a contract, Local 2 succeeded not only in holding the line on the critical issue of health benefits, but in securing a wage increase in the face of significant pressure to increase workload. This

76. *Law Professors Back Local as It Marks Second Year of Hilton Boycott*, 25 Lab. Rel. Wk. (BNA) No 62. (Jan. 13, 2011).

77. Other speakers included former AALS President, Emma Coleman Jordan (Professor, Georgetown University Law Center), Karl Klare (Professor, Northeastern University School of Law), Randy Shaw (local activist, attorney, journalist and Executive Director, Tenderloin Housing Clinic), and Local 2 members David Harlan (cook, Stanford Court), Robyn Shaheen (banquet server, Hilton Union Square), and Johan Tahir (bartender, Hilton Union Square).

78. *See Hilton Reaches Pacts With UNITE HERE Covering San Francisco, Honolulu, Chicago*, 25 Lab. Rel. Wk. (BNA) No. 389 (Mar. 10, 2011).

79. *See* Benny Evangelista, *Hilton, Union Reach Agreement in S.F.; Deal To Settle 18-Month Dispute, with Members Set to Vote Friday – Other Hotels Will Be Pressured*, S.F. CHRON., Mar. 8, 2011, at D1; *Hilton Reaches Pacts*, *supra* note 78. In addition, the dental care benefits cap has increased from $1000 to $2000 and dependant and monthly co-payments for dependent health care are set at $10. *See* Evangelista, *supra* at D1.

80. *See* Marc Norton, *No Concessions: Hotel Workers Beat Hilton and Blackstone, Fight On*, FogCityJournal.Com, <http://www.fogcityjournal.com/wordpress/2689/no-concessions-hotel-workers-beat-hilton-and-blackstone-fight-on/> (last viewed Dec. 14, 20111).

was both a victory for Hilton workers and a pivotal event in the union's relationship with the San Francisco hotel industry.[81] The Hilton contract represented the first settlement among more than fifty full-service hotels where workers had been without a contract since August 2009, and the pattern for all future negotiations.[82] As this Symposium goes to press, sixteen hotels have signed contracts modeled on the Hilton agreement.

B. Learning from AALS and Local 2

Was the AALS campaign a success? More importantly, what does it tell us about the power of labor movements? For the faculty boycott supporters, the campaign had its disappointments, beginning with AALS's refusal to fully relocate the Annual Meeting and ending with the failed House of Representatives Resolution. Yet these losses were largely symbolic. While faculty were unable to obtain an institutional expression of solidarity with the workers, the boycott supporters clearly won on the academic "street," achieving a *de facto* relocation despite the AALS's intransigence. That success in the face of surprisingly strong opposition illustrates the power of grassroots action to achieve results in cases where more formal efforts may prove unavailing. At the same time, the struggle as a whole suggests the inevitability of tension between an institution and its individual constituents that is the heart of labor/management conflict.

1. Workers Versus Management; Faculty Versus AALS

Analogizing between the AALS campaign and an actual organizing drive or labor dispute is a potentially fraught enterprise. Unlike the Local 2 members protesting the conduct of the Hilton, the faculty members protesting the decisions of the AALS were not engaged in a dispute with their employers. Because the AALS is a professional organization, and an organization of law schools rather than faculty, those who protested AALS action faced little risk of repercussions. Even in their true employment relationships, faculty are uncommonly privileged, enjoying an exceptional degree of job security and significant voice in managing the institutions they serve.[83] Whereas the Local 2 members who took action against the

81. *See Hotel Workers and Hilton Worldwide Reach Settlement in San Francisco*, ONE DAY LONGER SF, <http://www.onedaylongersf.org/?p=1753> (last viewed Dec. 9, 2011) (describing Hilton settlement as a "major breakthrough in citywide hotel negotiations").

82. *See* Evangelista, *supra* note 78, at D1; *Hilton Reaches Pacts*, *supra* note 77.

83. For this reason, the NLRB has held that faculty are managerial employees not protected by the NLRA. *See* NLRB v. Yeshiva Univ., 444 U.S. 672 (1980). Of course the degree of control faculty exert over their places of work vary both among and within institutions and status differences persist within the legal Academy. *See* Marina Angel, *The Modern University and its Law School: Hierarchical, Bureaucratic Structures Replace Coarchical, Collegial Ones*; *Women Disappear from Tenure Track*

Hilton put their livelihoods on the line, what was at stake for the faculty supporting them were personal conviction and professional reputation.[84]

Yet it is perhaps because of the special position of faculty and the mission of the legal academy that the conflict between faculty and the AALS is so telling. One would have expected a professional organization of law schools to be welcoming of appeals by faculty on any issue of institutional concern, purely as a matter of governance. As a requirement of AALS membership, a law school must "vest in the faculty primary responsibility for determining institutional policy."[85] Engaging the faculty of member schools on an issue of AALS policy would have been consistent with that mandate and in keeping with the spirit of academic debate. That does not mean that the AALS should have bowed to faculty conviction, but rather that it ought to have been more receptive to vetting its decision to remain at the Hilton within the AALS community. Yet throughout the campaign, the AALS appeared resistant to discussion. It communicated its decision not to relocate as a *fait accompli* through a formal statement of the Executive Committee. AALS leaders did not speak individually, and the committee as a whole remained relatively silent after pronouncing its decision. In addition, the AALS never addressed the substantive challenges to its decision contained in the Open Letter or the plea in the Joint Request for Reconsideration to engage in a dialogue on the issue. Indeed, the AALS never directly responded to those appeals at all.[86]

This reaction was especially troubling given what was at stake. In calling for the AALS to honor the boycott, faculty were entreating the organization to support an assertion of legal rights by those with limited bargain-

and Reemerge as Caregivers: Tenure Disappears or Becomes Unrecognizable, 38 AKRON L. REV. 789, 791 (2005) (describing the "contingent workers of higher education," who are principally women and comprise a "permanent underclass" within the Academy). However, in light of law school accreditation rules, it is fair to suggest that even faculty on the lower rungs of the legal academic hierarchy have greater security that many workers in the for-profit sector. *See* ABA Standards for Approval of Law Schools, standards 405(c) & (d) (2011-12), *available at* <http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_201 2_aba_standards_chapter4. authcheckdam.pdf > (requiring law schools to provide clinical faculty "a form of security of position reasonably similar to tenure" and to legal writing faculty "security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain [well qualified faculty] and (2) safeguard academic freedom").

84. That is not to discount the significance of the latter. For some faculty, supporting the boycott and taking a stand against the AALS meant risking professional relationships and possible rebuke or criticism from those who did not share their views.

85. Bylaws of the Association of American Law Schools, Inc., § 6-5 (as amended through Jan. 2008), *available at* <http://aals.org/about_handbook_bylaws.php>.

86. In addition to its failure to engage with faculty boycott supporters, the AALS did not respond to appeals from members of the union. As a result, the AALS was operating without complete information when it made its decision not to relocate the Meeting. Most notably, it assumed that hotels on the union's "at risk" list, including the Parc 55, could not be used as alternative locations. *See supra* note 52 and accompanying text.

ing power and, in effect, to speak out on a matter of public concern. Such acts are part and parcel with being a lawyer. The Model Rules of Professional Conduct define a lawyer's role not only as an advocate for a particular client but also as a "public citizen," someone who promotes and cultivates knowledge of the law on issues of social importance.[87] The Hilton boycott presented an opportunity for law faculty to model civic engagement. Indeed, some boycott supporters saw their participation not only as an ideological pursuit, but also as an act of professional responsibility as law teachers.[88] The AALS has in the past honored this notion of the civic responsibility of lawyers in its institutional statements and in its programmatic undertakings.[89] Yet the 2010 Executive Committee failed to take the opportunity to put such words into action.

Instead AALS leaders invoked their responsibilities as lawyers in one narrow way. In announcing its decision to remain at the Hilton, the AALS asserted that it owed a special obligation to "honor its contractual commitments."[90] Whether honoring the contract actually required the AALS to remain at the Hilton during the union boycott was far from clear.[91] Indeed, all evidence suggests that AALS had significant flexibility to alter its contractual obligations under the circumstances.[92] However, even if the organization was hard bound to its contract, asserting such a duty in isolation emphasized one limited aspect of lawyers' work – understanding and applying formal rules – to the exclusion of any other. AALS in effect used the risk of legal liability as a shield, precluding consideration of lawyers' deep-

87. MODEL RULES OF PROF'L CONDUCT pmbl. cmt.1 (2010); *see also id.* pmbl. cmt. 6 ("[A] lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."); *see generally* Bruce A. Green & Russell G. Pearce, *"Public Service Must Begin at Home": The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207 (2009); Russell G. Pearce & Eli Wald, *The Obligation of Lawyers to Heal Civic Culture: Confronting the Ordeal of Incivility in the Practice of Law*, 34 U. ARK. LITTLE ROCK L. REV. 1, 40-52 (2011) (exploring the role of lawyers as civics teachers in their daily practices); Deborah L. Rhode, *Lawyers as Citizens*, 50 WM. & MARY L. REV. 1323 (2009) (criticizing the under-developed contemporary understanding of lawyers' role as public citizens).

88. *See* Open Letter, *supra* note 45, at 2 ("In our view it is part of a law professor's job to model for students a commitment to principle.").

89. *See* Rachel F. Moran, President, AALS, President's Message: Transformative Law, Address before the AALS House of Representatives at the 2009 Annual Meeting (Jan. 6, 2009) (calling on the legal academy to resurrect the "citizen-lawyer" who, through "transformative law," can "challenge and reconfigure social institutions"), *available at* <http://aals.org/services_newsletter_presMarch09.php>.

90. September 27 Letter, *supra* note 41, at 1.

91. The AALS consistently rebuffed requests to produce its hotel contract citing unspecified confidentiality concerns. *See* E-mail from H. Reese Hansen, President, AALS to Gary Peller, Professor, Georgetown Law Ctr. (Dec. 15, 2010, 1:05 PM) (on file with author).

92. During the House of Representatives Meeting, President Olivas admitted that AALS venue contracts contain force majeure clauses. *See* House of Representatives Transcript, *supra* note 73, at 36. Certainly the organization's ability to relocate two-thirds of the section programs, seemingly without penalty, appears to confirm as much.

er responsibilities as public citizens.

What is so disturbing then is that an organization that might have been exceptionally sensitive to the rights at stake and in a unique position to take a public stand sought to distance itself from the dispute and, at times, diminish its importance. The AALS asserted that it was remaining neutral, a position that is untenable in a consumer boycott.[93] Boycotts succeed by leveraging the solidarity of those whose business sustains the employer. Honoring a boycott supports workers; failing to do so supports management. The AALS's suggestion that remaining at the Hilton was a neutral act was inaccurate if not misleading. More problematic were the organization's insinuations that the Hilton dispute was insignificant because the workers were not on a strike.[94] Such statements betray a lack of appreciation for the economic and legal realities that make strikes untenable for workers and frequently ineffective as pressure tactics. Strikes are a weapon of choice only where the removal of workers' services can meaningfully impair company operations. In the hotel industry, where employers can count on a steady flow of low-skilled labor, strikes places workers' jobs at risk while exerting only limited pressure on the employer. This is especially true in times of economic hardship and high unemployment like the recent Great Recession. But while the loss of its workforce may not seriously harm a hotel, the loss of its customers will. Thus, a boycott is not a lesser tool used in lower stakes disputes, but rather an innovative and more nimble way of achieving the strike's basic goal – to interfere with a company's ability to do business until it agrees to fair terms of employment.

That the AALS failed to understand these dynamics, or chose to ignore them, suggests how formidable a challenge unions face in eliciting the public support necessary to pursue a successful corporate campaign. It can only be more difficult to persuade commercial enterprises whose sympathies may naturally align with management. Such entities are likely to have less incentive to engage publically, less understanding of the legal rights at stake, and constituents with less ability to speak and act from personal conviction.[95]

93. *See, e.g.*, December 13 Letter, *supra* note 68, at 1.

94. *See, e.g., Id*.; December 30 Statement, *supra* note 71, at 2; House of Representatives Transcript *supra* note 73, at 35. President-Elect Olivas went further, suggesting that law faculty had manufactured the workers' picket. *See id.*

95. Professor Cynthia Estlund expresses a similar concern in considering the significance of the Yale University clerical campaign detailed in Getman's book. Despite the union's "nearly unparalleled advantages," including the sympathies of faculty and students as well as the practical impediments the University faced in responding to the campaign, the union won by only six votes. *See* Cynthia Estlund, *"It Takes a Movement" – But What Does it Take to Mobilize the Workers (in the U.S. and China)?* 15 EMP. RTS. & EMP. POL'Y. J., 507, 510 (2011).

Indeed, the irony of the AALS campaign is that, in dealing with faculty, the AALS acted the part of big management. Its reaction to the boycott supporters paralleled the moves typically made by companies attempting to subvert a union campaign. Its failure to respond to the Open Letter and its delay in granting relocation requests were reminiscent of the stalling and stonewalling unions often receive in response to their demands. The AALS's relocation process, offered as an accommodation to boycott supporters, was akin to a partial concession, the type of benefit that is typically unlawful during the course of a union campaign[96] and could constitute improper unilateral action during collective bargaining.[97] The AALS's public rebuke of one boycott supporter in an attempt to discredit the relocation effort echoed the type of retaliation typically visited on known union supporters. Even in the context of opposing the House of Representatives resolution, the arguments advanced by the AALS sounded themes commonly invoked by employers in opposing union demands. It argued that the resolution would constrain its flexibility and result in increased costs to the organization that would impair operations and ultimately be borne by faculty.[98]

In this way, the AALS debacle was not only an illustration of the modern union campaign in action but a metaphor for the very struggle that necessitates it. For all of their privileges, faculty entreating the AALS to support the boycott were handled much the way rank-and-file union supporters are by their employers. Why the AALS took this tack is unknown. Perhaps it is a natural inclination for those in control to hold fast to their advantage even where profit is not a motive. What is clear is that the dispute between law professors and the AALS bore the hallmarks of the fundamental power struggle that undergirds all labor conflict.[99] Thus, the AALS dispute poignantly revealed both how difficult it is for unions to succeed and why it matters so much that they do.

96. *See* NLRB v. Exchange Parts Co., 375 U.S. 405, 408-09 (1964) (finding that employer's announcement of holiday, vacation, and overtime benefits shortly before representation election constituted an unlawful interference with workers' Section 7 rights under Section 8(a)(1)).

97. *See* NLRB v. Katz, 369 U.S. 736, 747 (1962) (finding that employer violated duty to bargain in good faith by implementing sick leave plan and wage and bonus increases unilaterally without prior discussion with union).

98. *See* December 30 Statement, *supra* note 71, at 2 (suggesting that the cancellation of a hotel contract as a result of a labor dispute would result in a fifty to eighty percent increase in law school dues).

99. *See* Michael C. Duff, *Of Courage, Tumult, and the Smash Mouth Truth: A Union Side Apologia*, 15 EMP. RTS. & EMP. POL'Y. J., 521, 524 (2011) (describing the existence of this conflict as among the "first principles of labor realities" and a fundamental "axiom" in the belief system of "organizable" workers).

2. Of Legal Losses and Street Victories

The silver lining in the AALS campaign was the success of the section relocation process, a victory that is testament to the type of grassroots action that Getman acclaims. After reaching a dead end in seeking institutional support for the boycott, those of us committed to the union's cause proceeded at the faculty level. In doing so, we operated in the tradition of a worker organizing committee. We reached out directly to other faculty, sharing information about the conflict and details about the AALS's process that we believed had not been adequately communicated. We answered questions and provided support for filing relocation requests.

Like the organizing efforts Getman describes, the voices and experiences of those affected were an important force. This included the perspective of the workers, whose entreaties I forwarded to all section leaders in urging them to request relocation. It also included expressions of personal sentiment from faculty. Over the course of our dispute with the AALS, committed professors, moved by the events that were unfolding, shared their views publicly. These were not just statements of ideological conviction, but also stories of personal experience. Professor Hiroshi Motomura explained his decision to pull out of the AALS Presidential event in an e-mail to the Executive Committe about his father, who had been a hotel cook and a Local 2 member: "He never earned much," Professor Motomura wrote, "but what little he made was thanks to his union…. And the fact that the union stood up for him was a big part of what self-respect he had as a working person."[100] Urging the organization to carefully weigh proceeding with the conference versus honoring the boycott, he noted "my father sometimes walked the very picket line that attendees at the AALS annual meeting may need to cross if you do not reconsider."[101] This powerful statement was widely disseminated.

In contrast, we were not able to replicate this approach in preparing for the House of Representatives meeting, where our labor dispute resolution ultimately failed. This was partly due to our limited interaction with representatives. The AALS did not comply with our request for the names of each school's representative and we lacked the time necessary to generate our own list and use it effectively.[102] Thus, our communication with

100. E-mail from Hiroshi Motomura, *supra* note 67.

101. *Id.*

102. In contrast to the section leadership information that we used in our relocation campaign, the names of the law school representatives do not appear on the AALS website. Professor Peller attempted to contact schools individually for their delegate information and created an electronic forum for discussion of the resolution. However, by that time, it was late into the December holiday season (and close to the date of the Annual Meeting), making it difficult to generate interest in and fully vet the un-

representatives in advance of the meeting was limited to the transmission of our written statements by the AALS. This hurt our ability to convince faculty to act in the face of the Executive Committee's request that they respect its discretion. The AALS essentially asked the Representatives to trust the judgment of their leaders. To the faculty who had tried hard to convince the AALS to honor the boycott, only to face institutional intransigence and imperfect solutions, that request seemed preposterous.[103] But the history of our campaign most likely was not fully or widely known among the Representatives.

We were also hindered by our lack of familiarity with the procedure and culture of the House of Representatives. The environment in which the resolution was debated was highly regimented.[104] Due to time constraints, we emphasized the technical aspects of our resolution – the fact that it was non-binding and that we were asking the AALS merely to affirm faculty sentiment and to incorporate standard protections in its contracts. Although some faculty spoke out about their personal support for the boycott, this was not a key theme, nor was the environment conducive to such sentiment.

Finally, and perhaps most critically, we made a mistake in requesting a roll call vote. In part, that choice reflected a lack of experience with the forum. Our goal was to avoid the voice vote that is the House of Representatives default procedure given the seriousness of the issue and the likelihood of a close result. A roll call was the available alternative identified in the House of Representatives procedural rules, and we did not consider other options.[105] In this regard we failed to realize the constraints faced by those we wished to persuade. The Representatives are a diverse group in terms of seniority and experience. Some were new to AALS; some, untenured. President-Elect Olivas presented a vehement statement in opposition to the resolution, emphasizing the Executive Committee's superior ability

derlying issues.

103. For instance, the AALS asserted that it would establish a committee to consider the problem of labor disputes going forward, a promise that lacked credibility in light of the organization's consistent unwillingness to dialogue about its decision in the course of the dispute. *See* House of Representatives Transcript, *supra* note 73, at 35. Similarly, the AALS suggested that its hands had been tied in considering alternative locations given the number of San Francisco hotels at risk of dispute. *See id.* at 36. Such statements were disingenuous given the union's clear assurances that "at risk" hotels like the Parc 55 were not subject to an active labor dispute and would not experience a job action during the course of the Meeting.

104. Debate was limited to thirty-five minutes and structured so that resolution proponents received fifteen minutes, followed by fifteen minutes for those opposed, with three minutes reserved for final remarks. *See id.* at 22-23. Due to this time allocation, Professor Gary Peller, the resolution's co-sponsor, was unable to present his full closing statement in support of the resolution. *See id.* at 48.

105. At one point during the proceedings, Professor Marina Angel, the delegate from Temple Law School, called for a closed ballot, but that request was never debated or ruled on. *See id*. at 42.

to make decisions about how to handle its contracts and the risk of labor disputes.[106] Given the option to abstain, Representatives were persuaded to demur in deference to the Committee rather than publically contradict its assertion of authority. In short, AALS leadership succeeded in framing the resolution as an ill-considered challenge to the established order, and we had not laid the groundwork necessary to win in spite of this.

The contrast between our loss on the House of Representatives resolution and the result of the section relocation process offers a useful analogy for reflecting on UNITE HERE's organizing strategy. Irrespective of the final vote, the faculty campaign to honor the boycott succeeded: through peer-to-peer outreach, we were able to relocate the bulk of the conference despite the AALS's refusal to do so. That grassroots efforts are at times superior to more formal undertakings – including those grounded in law – is a lesson consistent with the message of Getman's book. In pursuing its comprehensive campaign strategy, UNITE HERE has consciously eschewed the NLRB election and unfair labor practices processes as unworkable for unions.[107] Focusing instead on the support of the rank-and-file and leveraging non-traditional forms of pressure, it has succeeded in expanding through voluntary recognition and neutrality agreements. Where legal rules or governing institutions are inhospitable, victories can and must be achieved without them.

That does not mean that law or legal reform should be abandoned. Getman believes that the National Labor Relations Act remains important and offers a variety of proposals for making the statute more relevant for unions. Among them is a call for increased union access to workers.[108] Without access it is impossible for unions to do the grassroots work necessary not only to organize particular workplaces but to instill the type of solidarity that ultimately sustains strong labor movements. The AALS campaign bears this out. We were able to generate support for relocation among the sections because the names and e-mail addresses of their leaders were publically available.[109] In contrast, there was no readily available list of delegates, and when the AALS refused to supply one, we were unable to create our own in time to make effective personal appeals before the Annu-

106. We had originally hoped that the Resolution would be unopposed given its nonbinding nature; subsequently we assumed that the Executive Committee would rely on its written statement of opposition.

107. *See supra* Part II.B.

108. *See* GETMAN, *supra* note 3, at 204; *supra* Part II.B.

109. The AALS website lists the executive committee members and their institutional affiliations for each section, and most law schools post contact information, including e-mail addresses, for their faculty members. We were able to quickly generate an e-mail list of all AALS section leaders by cross-referencing these sources.

al Meeting. If the delegates had been AALS employees and we had been organizers trying to reach them, the AALS would have been required to produce the list, but only after we had already generated enough support to file for an election.[110] The list would have included only names and physical addresses, not e-mails,[111] and the AALS could have barred us from entering its workplace and surrounding private property.[112] It most likely could also have barred us from contacting workers through its e-mail system (if we were able to somehow discover workers' company e-mail addresses on our own) and prevented the delegate-workers from communicating with one another about the union through company e-mail.[113]

Getman wants to amend current access rules to give unions equal time to respond to employers' anti-union rhetoric. His key targets are the captive audience speech, in which the employer assembles its workers to hear its case against the union, and the Supreme Court's *Lechmere* decision, which prohibited union organizers from entering an employer's parking lot.[114] What the AALS campaign adds to Getman's critique is the importance of a particular form of access – the ability to reach workers electronically. In seeking support for the relocation process, we relied almost exclusively on e-mail, which allowed us to connect instantaneously with hundreds of law professors at schools across the country. The electronic format meant we were also able to provide faculty with easy access to supporting resources, including forwarded content about the labor dispute, links to information necessary for completing the AALS relocation forms, and soft copies of sample forms.[115] Such an effort would have been impossible in the pre-internet days of leaflet organizing.[116]

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110. *See* Excelsior Underwear, Inc. 156 N.L.R.B. 1236, 1239 (1966); *see also* Technology Service Solutions, 332 N.L.R.B. 1096, 1098–99 (2000) (refusing to require dissemination of *Excelsior* list to aid union's pre-petition organizing efforts notwithstanding fact that employees, who worked from their homes across multi-state region, were unusually difficult to identify).

111. *See* Trs. of Columbia Univ., 350 N.L.R.B. 574, 576 (2007) (finding employer had no obligation to provide e-mail addresses of bargaining unit employees despite fact that employees worked aboard ship and would not receive mail sent to their homes during election campaign).

112. *See* Lechmere, Inc. v. NLRB, 502 U.S. 527, 537 (1992).

113. *See* Guard Publishing Co., 351 N.L.R.B. 1110, 1111 (2007) (finding that absent discrimination on the basis of union activity an employer's policy restricting employees' personal use of company e-mail does not unlawfully interfere with employees' Section 7 rights).

114. GETMAN, *supra* note 3, at 182-83.

115. For instance, over the course of the campaign we forwarded to faculty an e-mail from a worker about the substance of the dispute and links to the union's "green" list of acceptable hotels. During the relocation process we provided section leaders with links to the AALS's official list of officers for each executive committee so as to ensure that section chairs could achieve the unanimous support required for relocation. We also amended and re-circulated the AALS's relocation form, which had been distributed before the AALS agreed to allow sections to move to the Parc 55, so that section leaders could easily select that hotel as their preferred venue.

116. The importance of electronic communication in spawning and supporting grassroots action is borne out by recent world events. Social media resources are widely credited with enabling and sup-

Legal reform aimed at enhancing electronic access could therefore make a meaningful difference in unions' abilities to generate and sustain worker-centered movements. As this symposium goes to press, the Obama Board is poised to address a number of access issues that bear on electronic communication. Currently an administrative rule is pending that would require employers to provide their *Excelsior* lists – the required document identifying workers in the relevant bargaining unit – in both digital and print format and to include worker e-mail addresses in addition to physical contact information.[117] The Board is also set to revisit its standard for determining whether an employer has discriminated in denying union access to its property, an issue that has implications for both unions' and workers' ability to use company- owned technology.[118] Finally, it has issued complaints in a number of cases involving workers' use of social media.[119] These cases recognize that employees who post information about grievances and other work-related issues may be engaged in concerted activity.[120] Victories in such cases would insulate some social media activity from employer retaliation, enabling workers' use of those resources for union organizing and other collective action.

Developments like these could bring labor law into the twenty-first

porting the coinciding protests against oppressive political regimes which became the Arab Spring. *See, e.g.*, Jennifer Preston, *Movement Began with Outrage and a Facebook Page that Gave It an Outlet*, N.Y. TIMES, Feb. 6, 2011, at A10, *available at* <http://www.nytimes.com/2011/02/06/world/middleeast/06face.html?pagewanted=all>; Kevin Govern, Op-Ed, *The Twitter Revolutions: Social Media in the Arab Spring*, JURIST (Oct. 22, 2011), <http://jurist.org/forum/2011/10/kevin-govern-twitter-revolutions.php>.

117. *See* Representation – Case Procedures, 76 Fed. Reg. 36,812 (to be codified at 29 C.F.R. pts. 101-03).

118. *See* Roundy's Inc., 356 N.L.R.B. No. 27 (Nov. 12, 2010). The Board has requested briefing on the degree to which an employer may lawfully distinguish between different forms of solicitation on its property in prohibiting the presence of non-employee union representatives. *Id*. The same issue arises in cases involving employer retaliation against employees who transmit union messages via company e-mail. *Guard Publishing Co.*, a 2007 decision of the Bush Board, held that an employer could lawfully discipline an employee for sending a union solicitation via e-mail pursuant to the employer's policy despite its tolerance of e-mail use for personal solicitations. *See* 351 N.L.R.B. 1110, 1116 (2007). A union win in *Roundy's* would likely make it difficult for employers to draw such distinctions. It would not however prevent employers from prohibiting all non-work related use of its technology. . Several scholars have called for reform that would affirmatively allow greater worker access to e-mail. *See, e.g.*, Kenneth G. Dau-Schmidt, *Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform*, 94 MARQ. L. REV. 765 (2011); Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA*?, 76 GEO. WASH. L. REV. 262 (2008); Martin H. Malin & Henry H. Perritt, *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1 (2000); G. Micah Wissinger, *Informing Workers of the Right to Workplace Representation: Reasonably Moving from the Middle of the Highway to the Information Superhighway*, 78 CHI.-KENT L. REV. 331 (2003).

119. *See, e.g.*, Hispanics United of Buffalo, Inc., NLRB ALJ No.3-CA-27872 (September 2, 2011); Karl Knauz Motors, Inc., NLRB ALJ No. 13-CA-46452 (Sept. 28, 2011).

120. Scholars have made a similar argument with respect to off-job blogging activity. *See* Rafael Gely & Leonard Bierman, *Social Isolation and American Workers: Employee Blogging and Legal Reform*, 20 HARV. J.L. & TECH. 287 (2007).

century, however belatedly, empowering unions and workers to create a strong labor movement. Thus, one lesson to be drawn from both Getman's book and the AALS campaign is that legal and extra-legal action are not dichotomous. Efforts to better workers' lives need not and should not be hamstrung by retrograde rules and policies, but law reform can enhance unions' ability to conduct the grassroots outreach that inspires movements and, in some cases, achieves legal change.

IV. CONCLUSION: QUESTIONS & REFLECTIONS ON THE POWER OF UNIONS

So what lies ahead for labor and for labor law? The participants in this Symposium offer various perspectives on the viability of both effective labor movements and meaningful legal reform. Their contributions range from an historical and narrative account of an important labor movement victory,[121] to a comparative perspective on the potential for effective labor unrest domestically and in China,[122] to an exploration of the mindset and messaging required to inspire labor movement workers,[123] to an inside view of the workings of the NLRB and their effect on labor law and policy.[124] Like Getman's work and my own contribution, several of the papers draw on the authors' personal experiences – as workers, organizers, volunteers, and labor officials.[125]

Maria Ontiveros' contribution tells the story of the 1972-74 Amalgamated Clothing Workers of America's (ACWA) strike at Farah Manufacturing in El Paso, Texas.[126] Though the ACWA followed a traditional organizing model in many respects – pursuing the NLRB election and unfair labor practices processes while availing itself of the strike weapon – the union also employed many of the same techniques that UNITE HERE would ultimately refine in forging its comprehensive campaign strategy more than a decade later. The ACWA vigorously pursued a consumer boycott on the national level, forged broad connections with external actors and institu-

121. Maria L. Ontiveros, *Building a Movement with Immigrant Workers: The 1972-74 Strike and Boycott at Farah Manufacturing*, 15 EMP. RTS. & EMP. POL'Y. J. 479 (2011).

122. Estlund, *supra* note 95.

123. Duff, *supra* note 99.

124. Dennis P. Walsh, *Procedural Barriers That Prevent the NLRB from Resolving Major Workers Rights Issues*, 15 EMP. RTS. & EMP. POL'Y. J., 545 (2011).

125. Prior to entering the legal profession, Professor Michael Duff worked as a unionized airline ramp worker, shop steward, and ultimately an organizer for Teamsters. Duff, *supra* note 95, at 522. While in law school, Professor Cynthia Estlund served as a student attorney to the Yale clerical workers and played an active role in their successful organizing effort. *See* GETMAN *supra* note 3, at 64-65; Estlund, *supra* note 95, at 508. Deputy General Counsel Dennis Walsh is a former member of the National Labor Relations Board. *See Members of the NLRB since 1935*, NLRB.GOV, <http://nlrb.gov/members-nlrb-1935> (last visited Dec. 8, 2011).

126. Ontiveros, *supra* note 121, *passim.*

tions (including Catholic church leaders, national political figures, and the New York Central Labor Council), and promulgated a powerful message about the humanity and dignity of the largely Chicana workforce that ran the Farah plant.[127] Professor Ontiveros concludes that the ACWA succeeded because it not only used the law to its advantage, but also because it linked the Farah labor movement with the larger Chicano/a civil rights movement.[128] She suggests that to achieve their goals unions must empower their workers, remain true to democratic ideals, and offer a "values-based message" that goes beyond demanding better pay and employment terms.[129]

Cynthia Estlund's contribution expresses a more skeptical view of the potential for a sustained and successful labor movement, at least in the United States.[130] She agrees with Getman's proposals for labor law reform and finds inspiration in the episodes he recounts, but worries that American workers lack the "taste for battle" necessary for achieving not only union victories but also legislative change.[131] She contrasts the situation of American workers today with those in contemporary China where labor unrest threatens to disrupt the social order, much as it did in the U.S. prior to the passage of the NLRA.[132] Paradoxically, it may be that Chinese workers, who lack the basic constitutional and statutory protections American workers enjoy, are better situated to produce and sustain the type of successful labor and social movement that Getman describes.[133]

As if in answer to the questions raised by Professor Estlund, Michael Duff's contribution offers an expression of faith in workers' instinctive understanding of the fundamental struggle between management and labor and their willingness, when provoked, to "produc[e] . . . tumult."[134] Drawing on his personal experience as a unionized airline worker and union organizer, Duff develops a picture of the "original position" worker – one who is inherently receptive to, but must still be convinced of, the need for unions – and a corresponding message about the value of organized labor that speaks to originalist ideology.[135] He suggests that "authentic" labor organizers can deliver this message – one that is honest about the limits of law, that engages skepticism about the benevolence of employers, and that

127. *See id.* at 490-93.
128. *See id.* at 502-03.
129. *Id.* at 503.
130. Estlund, *supra* note 95, *passim*.
131. *Id.* at 519.
132. *See id.* at 513-14.
133. *See id.* at 514.
134. Duff, *supra* note 99, at 526.
135. *Id*. passim.

taps primordial feelings of fairness and solidarity – in a way that awakens labor movement workers.[136]

The piece by Dennis Walsh turns our attention inward to the workings of the Board to ask what reforms might make the institution more relevant to the labor movement.[137] Walsh argues that both the appointment and confirmation process for Board members and the absence of deadlines for Member action delay the Board's decision making process and lead to ever more polarized results that are at risk of being overturned when Board composition changes.[138] The upshot is that Board action is neither swift nor definitive enough to have a meaningful impact on critical issues of labor policy.[139] Recognizing the limits of internal deadlines that rely on self-enforcement, he calls for a "return to a more rational nomination and appointment process . . . which will remove [Members'] temptation to hold up cases until a satisfactory lineup of Board members come along."[140]

My own views of the power and potential for a viable labor movement have fluctuated since the 2011 Meeting. I left San Francisco feeling that our partial victory was bittersweet. Not only was I disappointed about the result of the resolution process, I was ambivalent about the value and significance of our street-level success. Law professors are an easy group to inspire. Our jobs not only allow us uncommon flexibility and freedom to carry through on our ideals, but arguably compel us to do so. It was hard to imagine the AALS campaign as a sustainable model for creating movements among average workers burdened with all of the demands and distractions of their day-to-day lives. Even accepting credit for what we achieved, I was acutely aware that the AALS campaign was just a small skirmish in a much larger battle. Upon the conclusion of the Annual Meeting, our dispute with the AALS ended; but the workers' struggle for a new contract, already in its second year, waged on. I feared that what we had produced was a show of support, meaningful to those who had participated, but the effect of which was more aesthetic than real.

However, I have since grown more optimistic. This change owes in part to the swift resolution of the Hilton dispute. Just two months after the Annual Meeting, Local 2 succeeded in obtaining a contract on terms far more favorable than had seemed possible given the hotel's position up to that point.[141] At first I saw the timing as a fortuity, but have become con-

136. *Id.* at 475.
137. Walsh, *supra* note 124, *passim.*
138. *See id.* at 546-48.
139. *See id.* at 548.
140. *Id.* at 553.
141. *See supra* Part III.A.4.

vinced that the faculty who supported the boycott share a small claim to the union's victory.[142] The activism of individual professors in embracing the union's cause was a unique event. Our involvement validated the workers' experience and demonstrated solidarity across socio-economic lines. As a practical matter, it also garnered media attention.[143] Not long after our street protest, Hilton management brought in a new negotiating team more amenable to the union's demands and more committed to reaching a contract.

Another reason for my renewed faith in the power of movements is the recent eruption of political and social action seeking to better the position of working people. The trend began in Madison, Wisconsin, where during the winter of 2011, tens of thousands of people flooded the capitol building and demonstrated across the state to protest a bill removing the collective bargaining rights of public employees.[144] It has continued with Occupy Wall Street, a grassroots movement opposing income inequality and corporate power that began with a series of public demonstrations in downtown Manhattan and has since inspired sister movements in major cities throughout the United States and abroad.[145]

Of course, social protest at this level is both rare and hard to sustain. Eventually public spaces must be cleared; protestors go home; faculty return to their classes. But such moments of engagement reverberate, entering the public discourse and triggering other forms of protest, including more formal action. Since the events in Madison, two republican lawmakers have been recalled, and efforts are underway to remove Governor Scott Walker.[146] Two federal lawsuits challenging the Wisconin law are pend-

142. David Harlan, a hotel cook and Local 2 Boycott Committee Member had this to say about the faculty campaign: "I do believe that the AALS trauma was definitely a case of the small snowball, turning into a larger snowball, turning into an avalanche. Everyone from the AALS and all of their sacrifices absolutely have a right to celebrate this not only as a L[ocal] 2 victory but a victory for the AALS activists who played such an important role in reaching that settlement." E-mail from David Harlan to author (July 14, 2011, 7:35 PM) (on file with author).

143. *See, e.g.*, *Law Professors Back Local*, *supra* note 75; Finamore, *supra* note 31; Leigh Jones, *Law Schools' Annual Meeting Site Draws Protests – Again*, NAT'L L.J. (December 7, 2010), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202475870997>; Denise M. Champagne, *Law Professors Are Worked Up over San Francisco Labor Dispute*, DAILY RECORD (Rochester, N.Y.) (Dec. 20, 2010), <http://nydailyrecord.com/blog/2010/12/20/worked-up-over-labor-disputes/>.

144. Michael A. Fletcher, *Latest Protest in Wis. Draws Thousands*, WASH. POST, Mar. 6, 2011, at A4; Richard A. Oppel, Jr. & Timothy Williams, *Rallies for Labor, in Wisconsin and Beyond*, N.Y. TIMES, Feb. 27, 2011, at A4. In a stunning show of solidarity, Democratic state senators fled the state to stymie efforts to bring the controversial bill to a vote before the State Assembly. Fletcher, *supra* at A4.

145. *See Hundreds Arrested in Occupy Protests*, WASH. POST. Oct. 17, 2011, at A3; *see generally* OCCUPYWALLSTREET, <http://occupywallst.org/> (last visited Dec. 9, 2011) ("Occupy Wall Street is [a] leaderless resistance movement . . . . The one thing we all have in common is that We Are the 99% that will no longer tolerate the greed and corruption of the 1%.").

146. *See* Monica Davey, *In Wisconsin, a Big Recall Push Comes Up Short*, N.Y. TIMES, Aug. 11, 2011, at A15.

ing,[147] while in Ohio, voters by referendum overturned a similar law restricting collective bargaining rights of public workers in that state.[148] As this Symposium goes to press, protests spawned by the Occupy Wall Street movement continue the "successful production of tumult."[149] The movement has entered the discourse of the 2012 presidential race,[150] and spurred both interest in unions and, in some cases, collaboration between protesters and organized labor.[151] It remains to be seen what types of legal action and political reform might come of those highly visible and deeply inspired acts of social protest. Successful movements, in other words, may not require an ongoing conflagration, so much as a periodic spark. As the AALS campaign demonstrates, those moments are indeed attainable.

147. *See* Scott Bauer, *Second Federal Lawsuit Filed over Collective Bargaining Law*, WISLAWJOURNAL.COM (July 07, 2011, 10:09 AM) <http://wislawjournal.com/2011/07/07/second-federal-lawsuit-filed-over-collective-bargaining-law/>. An earlier challenge in the state courts failed. See State ex rel. Ozanne v. Fitzgerald, 798 N.W.2d 436 (Wis. 2011).

148. *See* Sabrina Tavernise, *Ohio Overturns A Law Limiting Unions' Rights*, N.Y. TIMES, Nov. 9, 2011, at A1.

149. Duff, *supra* note 99, at 526; *see also* Estlund, *supra* note 95 at 513 ("[F]or workers to get labor law reform that favors unions, they are going to have to make some trouble.").

150. See Peter Wallsten, Obama Looks to Harness Anti-Wall St. Angst, WASH. POST, Oct. 15, 2011, at A1.

151. See Melanie Trottman, Unions Look to Protesters for Future Supporters, WALL ST. J., Oct. 29, 2011, at A2; Greg Sargent, What if Working Class Americans Actually Like Occupy Wall Street? WASH. POST (Oct. 17, 2011, 2:23 PM) <http://www.washingtonpost.com/blogs/plum-line/post/what-if-working-class-americans-actually-like-occupy-wall-street/2011/10/17/gIQAniVzrL_blog.html> (reporting that Working America has experienced an upsurge in recruits as a result of the movement).